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Supreme Court of the United States

October Term, 1977

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV AND RITA SHAEV,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF

December 15, 1977

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Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 20 F.R. Serv. 2d 1218. (PA-1a).*

The memorandum order of the District Court entered following motions for reargument of its opinion is unreported. (PA-9a).

The opinion of the 3-judge panel of the Second Circuit Court of Appeals is reported at 558 F.2d 636, 21 F.R. Serv. 2d 1213. (PA-11a).

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*"PA" refers to pages in the Appendix to the Petition for a Writ of Certiorari filed with this Court on September 1, 1977.

The subsequent opinion of the Court of Appeals on rehearing en banc is reported at 558 F.2d 646, 23 F.R. Serv. 2d 676. (PA-34a).

Jurisdiction Of The Court

The judgment of the Second Circuit Court of Appeals en banc was entered on June 22, 1977. The Petition for a Writ of Certiorari was filed on September 1, 1977, and the Petition was granted on October 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Rules Involved

The following rules are involved in the determination of this case, and are set forth in full text in the Appendix attached to this Brief:

Fed Rule Civ. Proc. 23, 28 U.S.C.

Fed. Rule Civ. Proc. 26(b)(1), 28 U.S.C.

Fed. Rule Civ. Proc. 33(c), 28 U.S.C.

Fed. Rule Civ. Proc. 34, 28 U.S.C.

Question Presented

Whether in a class action maintained under Fed. Rule Civ. Proc. 23(b)(3), any of the defendants can be required to bear the substantial expense of identifying and assembling the names and addresses of class members for

the purpose of relieving plaintiffs of that obligation incident to sending the initial class action notice required by Fed. Rule Civ. Proc. 23(c)(2).

Statement Of The Case

This is a proceeding to review a judgment of the United States Court of Appeals for the Second Circuit, en banc, that would require petitioner Oppenheimer Fund, Inc. (the "Fund"), at substantial expense, to ascertain the names and addresses of some 121,000 class members, in order to enable respondents ("plaintiffs") to send the notice required by Fed. Rule Civ. Proc. 23(c)(2).[1] The en banc judgment reversed the judgment of a 3-judge panel of the Second Circuit and affirmed an order of the United States District Court for the Southern District of New York that had required the Fund to pay this expense.

1. *Background*

Plaintiffs seek to maintain this action on behalf of a class of 121,000 current and former shareholder accounts of the Fund acquiring shares between March 28, 1968 and April 24, 1970 (the "relevant period"). (PA-4a, 7a, 10a). Petitioners ("defendants") are the Fund, an open-end investment company registered under the Investment Company Act of 1940 ("1940 Act"), 15 U.S.C. §80a-1 *et seq.*; Oppenheimer Management Corporation (the "Manager"), the investment adviser to the Fund; Oppenheimer & Co., a New York Stock Exchange member firm which owned during the relevant period all the voting shares of the

[1] The Federal Rules of Civil Procedure will be referred to in this brief as "Rule . . .".

Manager; and directors of the Fund during the relevant period.[2] (A-59, PA-37a).

The Fund sells its shares to the public at a price that reflects the current value of the Fund's assets, plus a service charge. (PA-37a). A shareholder desiring to liquidate his shares sells them to the Fund, which redeems them for a sum representing the proportion of the Fund's net assets represented by the shares. (A-122, PA-37a). As of March 30, 1973, when plaintiffs served their class action motion under Rule 23(c)(1), the Fund had approximately 171,000 shareholders (PA-38a), and net assets of approximately $523,000,000. (A-122).

The fees of the Manager for performing its advisory and administrative functions pursuant to its agreement with the Fund are computed as a percentage of the net asset value of the Fund's portfolio.[3] (PA-37a).

The Fund's shareholder accounts are of two kinds. As of August 31, 1973, Fund shares were directly owned by approximately 86,000 investors. (A-208). In addition, Fund shares were owned beneficially by approximately 85,000 planholders through Oppenheimer Systematic Capital Accumulation Program ("OSCAP"), an investment company of the unit investment trust type, registered under the 1940 Act. (A-122, 208). Fund shares held

[2] Petitioning directors are: Leon Levy and Jack Nash, senior partners in Oppenheimer & Co. and officers of the Fund; Edmund T. Delaney, Esq., former partner in the firm of Townsend & Lewis, formerly counsel to the Fund; and former Congressman Emanuel Celler. (A-128).

Other directors named as defendants are Murray Graham, Eric Hauser, Joseph M. McDaniel, Jr. and Sidney M. Robbins. These individuals have not appeared in the action.

[3] In accordance with Section 15 of the 1940 Act, 15 U.S.C. § 80a-15, the contract between the Fund and the Manager is renewed and reviewed annually by the Board of Directors of the Fund.

by OSCAP are credited to accounts of planholders so that each planholder owns a specified but undivided interest in the total Fund shares held in OSCAP's name. (PA-2a).

2. *Nature Of The Action*

The actions herein were brought against defendants by (1) Irving Sanders, on March 26, 1969; (2) Egon Taussig, on May 12, 1969; and (3) Michael and Rita Shaev, on June 18, 1969. (A-123). At the commencement of their actions, Sanders owned 209 Fund shares (through OSCAP); Taussig owned 2,369; and the Shaevs owned 45.[4] (Fractions of shares are omitted.) (A-123). The actions were consolidated on December 17, 1969. (PA-2a).

Plaintiffs essentially allege that during the relevant period defendants other than the Fund (the "non-Fund defendants") caused the Fund to overvalue restricted securities in the Fund's portfolio.[5] (A-112-113). The alleged overvaluation purportedly caused (1) plaintiffs and members of the class to pay inflated prices when acquiring Fund shares (PA-37a), (2) the Fund to pay inflated prices when redeeming its shares and (3) the Fund to overpay the Manager to the extent that the Manager's fees depended on the value of the Fund's portfolio. (A-112-13, PA-3a). Plaintiffs further allege that the non-Fund defen-

[4] At the commencement of the actions, the net asset values per share were approximately $8.49, $9.11 and $8.19 respectively, as computed from Exhibit 1 of Defendants' Answers to Plaintiffs' Interrogatories. (Record, Document 30.)

[5] Restricted securities, which are usually acquired from an issuer, are securities whose public sale or distribution is restricted under the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, until registered or until an exemption from registration becomes available. Section 2(a)(41) of the 1940 Act, 15 U.S.C. § 80a-2(41), provides that securities for which market quotations are available shall be valued at market value; and other securities, such as restricted securities, shall be valued at fair value as determined by the board of directors in good faith.

dants caused the Fund to fail to make adequate disclosure in prospectuses and periodic reports of the acquisition of restricted securities and of the methods of their valuation. (PA-3a). The alleged conduct purportedly constituted violations of Sections 12(2) and 17 of the Securities Act of 1933, 15 U.S.C. §§77*l*(2) and 77q; Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5 issued under the 1934 Act, 17 C.F.R. §240.10b-5; Sections 22, 30 and 37 of the 1940 Act, 15 U.S.C. §§80a-22, 80a-29 and 80a-36, and rules issued under the 1940 Act; and fiduciary obligations under state law.

Plaintiffs seek to recover damages from the non-Fund defendants only, in the amount that plaintiffs and members of the class allegedly overpaid the Fund because of the alleged overvaluation of securities. (A-112-113). Since plaintiffs have asserted no claims against the Fund (PA-17a), the Fund is a nominal defendant only, without a direct interest in the outcome of the class claims. If the class recovers, however, the Fund may be liable to the non-Fund defendants on their cross-claims to the extent that the Fund has benefited from any overpayments. (A-67, 89).

Plaintiffs have also asserted derivative claims on behalf of the Fund against the non-Fund defendants to recover from them allegedly excessive fees that the Fund paid to the Manager (A-20, 52; PA-4a), and allegedly excessive amounts paid by the Fund in redeeming shares during the relevant period. (A-29, 53). The derivative claims are not related to class notice costs, the issue here on review. (PA-18a).

In their answers, defendants have denied the material allegations of the complaint and have asserted various affirmative defenses. The answers allege, among other things, that the value of the restricted securities never

exceeded 10% of the value of the Fund's assets (A-61, 75); that the restricted securities were at all times carried at their fair value as determined in good faith by the Board of Directors of the Fund pursuant to Section 2(a)(41) of the 1940 Act (A-64, 76); and that the Fund fairly, adequately and timely disclosed its investments in restricted securities. (A-61, 75, 84-5). The non-Fund defendants have alleged set-offs against plaintiffs and the Fund to the extent that the alleged overvaluation of Fund securities benefited them. (A-66-67; 89-90).

On March 30, 1973, some four years after the complaints were filed, plaintiffs moved pursuant to Rule 23(c)(1) for an order determining that their action was maintainable as a class action. (A-111, 120). The class they sought to represent consisted of all persons who bought Fund shares between March 28, 1968 and April 24, 1970, both directly and through OSCAP.[6] (A-142). The members of the class designated by plaintiffs numbered approximately 121,000. (A-130, PA-13a). As of the date of the motion for class determination, only about 103,000 class members still owned Fund shares. (A-130, 145, PA-5a).

Plaintiffs' attorneys claim that, on the average, each class member sustained aggregate damages of approximately $15. (Plaintiffs' Affidavit ¶3, Record, Document No. 93). Defendants contend that even if the restricted securities were consistently overvalued by as much as 10%,[7] the average shareholder account would have been damaged in the aggregate by no more than $2 to $24, depending on the date of purchase of the shares. (PA-4a).

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[6] Purchasers included those who during the relevant period first purchased Fund shares and existing Fund shareholders who made additional purchases. (A-191).

[7] As previously stated, defendants deny that there was any overvaluation.

3. *Costs Of Notice*

In connection with their class determination motion, plaintiffs on July 18, 1973, took the deposition of the Fund's independent transfer agent, Investment Company Services Corporation, to obtain information concerning the methods and costs of determining the names and addresses of class members. (A-163, PA-20a). The deposition revealed that the transfer agent maintained separate magnetic computer tapes for direct Fund shareholders and OSCAP planholders. (A-167). The names and addresses of these shareholders were maintained on a current basis only, so that no existing tapes would yield a printout of purchasers of Fund shares during the relevant period. (PA-13a). The class members could be identified only by devising procedures and programs to scan tapes relating to shareholder lists and transactions during the relevant period; and separate procedures and programs would be required for identifying direct shareholders and OSCAP planholders.[8] (A-166).

The cost of identifying the class members involved the cost of (1) keypunching, including the cost of IBM cards, machine time, and operator's time; (2) preparing the necessary programs; (3) computer time, including time for testing programs (A-197); (4) computer operator's time (A-188); and (5) supervisory time. (A-183-186, 195-197). The transfer agent estimated in 1973 that the total cost would be in excess of $16,000 (Schedule A to Memorandum of the Oppenheimer Defendants on Class Motion and Further Proceedings, Record, Document No. 79), an amount which doubtless will be higher at the present time.

[8] Identifying the relevant purchasers who were direct shareholders entails, in addition to programming and other procedures for scanning tapes, keypunching IBM cards on the basis of transactions reported in daily journals and placing the information on the cards onto magnetic tape. (A-172-174). With respect to programming, four programs are required to identify direct shareholders (A-175, 181-182) and another four to identify OSCAP planholders acquiring their interests during the relevant period. (A-192-194).

Besides identification costs, notification of the class entails printing and handling costs of approximately $5,000.[9] (A-146). Plaintiffs' counsel has stated that plaintiffs would pay $5,000 for printing and handling costs (A-146), but not the more than $16,000 then estimated for identification costs, stating:

> "Thus, the total cost of giving notice to the class if it were necessary to ascertain the names and addresses of the members of the class at this time and to send the notices solely to these individuals would be in excess of $20,000. . . . [P]laintiffs are not in a position to agree to pay the costs of notice in this amount . . . ." (A-148-149; A-143).

Accordingly, plaintiffs have taken no steps to ascertain the names and addresses of members of the class, although the requisite daily journals, magnetic tapes, and computer machinery have been fully available to them. (PA-51a-52a).

4. *Plaintiffs' Attempt To Alter Their Original Class Definition*

While plaintiffs' class action motion was pending in the District Court, *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (*"Eisen III"*), was decided, holding that the costs of notifying class members ordinarily were payable by plaintiffs. Plaintiffs then moved to change the definition of the class they purported to represent,

[9] This sum does not include postage. (A-146). Plaintiffs have suggested that after defendants have identified class members, the class notice to those who are still Fund shareholders should be part of the Fund's next regular mailing to its shareholders, thus eliminating separate postage expense for mailing to the majority (as of 1973) of class members.

solely for the purpose of avoiding the expense of class member identification. (A-142, PA-38a). Specifically, plaintiffs proposed amending the definition of the class to eliminate persons who were not Fund shareholders or planholders at the time notice was to be mailed—i.e., to exclude from the class a group consisting of some 18,000 persons who had acquired Fund shares during the relevant period. (PA-20a). Plaintiffs simultaneously sought to have the Court direct that the class notice be given by insertion of the notice in a regular Fund mailing to all its current shareholders, whether or not members of the class. (A-145, PA-7a).

Defendants opposed plaintiffs' proposal because the mailing to all Fund shareholders would have unnecessarily risked grave harm to the Fund. (A-129). Under the aegis of a court-approved notice, the proposal would have caused delivery of plaintiffs' claims, with their injurious allegations concerning defendants, to some 68,000 current shareholder accounts that were not class members. (PA-20a). At the time defendants opposed the proposal, stock market prices had declined severely[10] causing a substantial loss of investor confidence in the stock market, which was reflected in the mutual fund industry, so that net redemptions exceeded gross sales. (A-131). The proposed notice could reasonably be expected to lower further investor confidence and consequently to trigger further substantial redemptions. Thus Robert Galli, Secretary of the Fund

[10] Some experts pronounced the market's decline "its sharpest decline since 1932." Richard J. Stinson, *Financial World*, January 29, 1975, p. 19. *Business Week*, January 27, 1975, at p. 50 reported:

> "The Dow-Jones average has lost more than one-third of its value in the past two years and the Value Line Composite Index—which includes some 1,550 issues and is more indicative of how the average investor has probably fared—has been more than halved since early 1973."

and Administrative Vice President of the Manager, stated in an affidavit dated May 23, 1973:

> "A broadcast mailing of a class action notice to all of the current shareholders of the Fund, even though a very large number of them have no direct interest in the suit, will undoubtedly cause shareholders to redeem their shares; and it is possible that such a notice may precipitate a substantial demand for redemption, which could well have some of the unfortunate effects of a run on a bank. In order to meet redemption calls, the Fund's liquid assets are consumed, thereby preventing the Fund from taking advantage of investment opportunities and, in addition, the Fund will be required to make forced sales of securities in a very poor market—all to the detriment of the Fund and its shareholders." (A-131).

Plaintiffs' proposal would have effected savings in notice costs only if both elements (class reduction and broadcast mailing) were permitted. Only together would these elements eliminate the need for and the cost of class member identification. Merely reducing the number of class members would not have accomplished this. Special programming and other costs would still have been necessary to identify the 103,000 persons constituting the class if notice were to be given only to them.

5. *Decision And Order Of The District Court*

The District Court in a decision dated May 15, 1975, held this action maintainable as a class action. (PA-5a). It designated as class members the approximately 121,000 shareholder accounts that had acquired shares of the Fund between March 15, 1968 (a date later corrected to March 28, 1968) and April 24, 1970—the class plaintiffs had originally sought to represent. (A-142). It rejected defen-

dants' proposal to limit the class by shortening the relevant purchase period.[11] (PA-6a-8a). The Court also rejected plaintiffs' double-barreled class-reduction and broadcast-mailing proposal on the ground that it was arbitrary and improper. Omitting from the class, as plaintiffs wanted, those persons who had bought Fund shares during the class period but had sold them afterwards, would, said the Court,

> "cut out . . . approximately 18,000 persons who logically belong in the class." (PA-7a).

The Court added:

> "I can simply say that in my view, *plaintiffs' proposal would involve an arbitrary reduction in the class.* If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares." (Emphasis supplied). (PA-5a-6a).

Since redefinition of the class was found objectionable, it was unnecessary for the Court to rule on the broadcast-mailing element of plaintiffs' proposal. Nevertheless, the Court acknowledged defendants' objection to a mailing that "would result in the notice being sent to numbers of shareholders who are not members of the class." (PA-8a).

The Court also indicated that defendants opposed plaintiffs' proposal "*presumably* because it would limit the res judicata effect of this action." (Emphasis supplied). (PA-5a). It did not attempt to harmonize this hypothesis

[11] Defendants sought to have the class reduced by limiting it to purchasers of Fund shares during the one-year period from March 15, 1968 to April 25, 1969 instead of the two-year period from March 28, 1968 to April 24, 1970 originally proposed by plaintiffs and ultimately approved by the District Court. (PA-6a).

with the fact that defendants had sought to have the class defined even more narrowly than plaintiffs had.

The Court's attempted solution was to require plaintiffs to send individual notice to class members alone, and to require the Fund

> "to be responsible for whatever work and expense is involved in providing the list of class members to plaintiff." (PA-2a).

The Court cited no authority for allocating the costs of identifying class members to the Fund, although it acknowledged that identification costs were "connected with the giving of notice." (PA-2a). It advanced two reasons for its decision: first, that "the expense [of providing the list of class members] is relatively modest" (PA-6a); and second, that "it is defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (PA-6a).

Both plaintiffs and defendants moved for reargument of the District Court's decision. On September 30, 1975, the Court entered a memorandum order making clear that the starting date of the relevant period was March 28, 1968, and providing, in material part, that the Fund would bear "the cost of culling out the list of class members" and that plaintiffs would mail class notices at their own expense only to class members. (PA-10a).[12]

6. *Decision Of The Three-Judge Panel Of The Second Circuit*

Defendants appealed to the Second Circuit Court of Appeals the District Court's decision that the Fund had to bear the substantial expense of identifying class mem-

[12] The memorandum order enabled plaintiffs to minimize the expense of mailing by requiring the Fund to send notices as part of its regular mailings to class members who were still Fund shareholders, but not to shareholders who were not class members.

bers.[13] Defendants also appealed the decision that the action was maintainable as a class action, on the ground that that action was unmanageable, but defendants do not seek review of that issue by this Court.

A majority of the Second Circuit Court of Appeals panel (Judges Mulligan and Palmieri;[14] Judge Hays, dissenting) reversed the District Court to the extent that it had imposed on the Fund the costs of identifying class members. It held that these identification costs were part of the costs of notifying the class:

> "[W]e are of the opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes." (PA-21a-22a).

Under *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*"Eisen IV"*), in the Panel's view, plaintiffs had to bear such costs:

> "[T]he cost of such notice must be borne in the first instance by plaintiff. . . . In the usual case, defendants may not be compelled in a class action to provide financial support for a class action against themselves." (PA-15a).

The Panel rejected as an inappropriate basis for decision the District Court's finding that the identification expenses were relatively modest. Under *Eisen IV*, consideration of the relative abilities of plaintiffs and defendants

[13] Jurisdiction was predicated on 29 U.S.C. § 1291 and the collateral order doctrine. See *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

[14] Edmund L. Palmieri, United States District Judge, Southern District of New York, sitting by designation.

to bear notice costs was irrelevant to the determination of who must pay them:

> "[The District Court] found the expense was 'relatively modest,' apparently in relation to the assets of the Fund which exceeded $500,000,000. This is an inappropriate consideration in the determination of the incidence of notice costs, even if the costs force the plaintiffs to discontinue as in *Eisen IV*." (PA-19a-20a).

It further found that defendants' opposition to plaintiffs' class reduction-broadcast mailing proposal had not increased the costs of notice. The District Court had rejected plaintiffs' proposal because the class as redefined would have been improper:

> "The district court . . . [found] that these persons [to be excluded from the class as redefined] could not be excluded because to do so 'would involve an arbitrary reduction in the class.' The class as originally defined [by plaintiffs] was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the cost. The two issues are distinct. . . . [The] identification costs cannot be viewed as additional expense necessitated by unreasonable or partisan demands on the part of the defendants." (PA-20a-21a).

The Panel noted that the District Court's decision mooted plaintiffs' request to mail notices to non-class members; therefore the District Court had not considered the validity of defendants' objections to plaintiffs' broadcast-mailing request. (PA-21a).

The Panel nevertheless deemed defendants' objections to notifying non-class members well-founded. While recognizing that Fund shareholders may well have been "ad-

vised of the nature and pendency of this suit 13 times since 1970 in proxies, prospectuses and annual reports" (PA-21a), the Panel found the impact of that kind of notice far less substantial than that of an official notice of a class action:

> "[W]e think that notice of that type [i.e. in proxies, prospectuses and annual reports]—usually several paragraphs in a footnote written by management and with a strong denial of merit—would have a far milder impact than a separate communication (though mailed with other papers) composed by the plaintiffs, giving a detailed explanation of the claims and without a denal of merit, particularly when the latter portends the imminent prosecution of a matter which the steady flow of prior notices had indicated was dormant if not defunct . . . ." (PA-21a).[15]

The Panel also dismissed plaintiffs' argument that the costs of identification were discovery costs allocable within the discretion of the District Court; it held they were notice costs and therefore not allocable. (PA-23a). It likewise rejected the view that any fiduciary duties which may have existed among plaintiffs and defendants justified imposing notice costs on any defendants. (PA-17a-19a).

Even if the identification costs were deemed discovery costs instead of notice costs, the Panel concluded plaintiffs would nevertheless have to bear them under Rule 33(c):

> "Under this rule [Rule 33(c)], a party will not be required to perform burdensome extraction of information from sources that are available to the party seeking discovery." (PA-22a).

[15] The District Court specifically found that a Fund prospectus had deemed the suit meritless in the opinion of management. (PA-6a).

Specifically rejected was Judge Hays' dissenting view that Rule 34 exclusively governed identification of class members. The Panel stated that Rule 34 dealt with the "production" of data compilations—not "sorting" and "analysis of data" (PA-23a, n.7) and added:

> "The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different one from the production for inspection and copying with which Rule 34 is concerned. If 'sophisticated electronic manipulation and analysis' become necessary, 'the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets.' 8 C. Wright and A. Miller, Federal Practice & Procedure §2218 at 659 (1970)." (PA-23a, n.7).

7. *Decision Of The Second Circuit On Rehearing En Banc*

On plaintiffs' application, the Second Circuit Court of Appeals reconsidered en banc the issue of who should bear the costs of identifying class members. With three judges dissenting, the Second Circuit reversed the 3-judge Panel decision and affirmed the District Court decision which provided that the Fund at its own expense must extract from its computer records and furnish to plaintiffs the names and addresses of class members.

Although this issue arose under plaintiffs' Rule 23 motion for class determination and not under any discovery rule, the Circuit majority stated that "it hardly requires our extended discussion to establish that the information sought by plaintiffs as to the names and addresses of the members of the class is indeed within the broad scope of permissible discovery. . . ." (PA-40a).

The majority said that the costs of class member identification were costs of notice but held these costs should be allocated to defendants under Rule 34, a discovery rule

which defendants contend does not apply to new programming at their expense in order to satisfy plaintiffs' obligations under Rule 23. Said the majority:

> "In *Eisen,* the plaintiff's effort to impose the costs of notice upon the defendants failed '[i]n the absence of any support under Rule 23.' Here, Federal Rule of Civil Procedure 34 provides the basis for requiring the fund, at its own expense, to provide plaintiffs with discoverable information contained in its computerized records." (PA-40a).

The majority held the names and addresses of class members discoverable because they were relevant to a "potential issue"—an issue that might arise in the future—of whether or not proper notice had been sent to class members:

> "The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are 'relevant to the subject matter' of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as *a potential issue in all such litigation* whether the required notice has properly been sent. A list of the names and addresses of the class members would of course be essential to the resolution of that issue. See *Appleton Electric Co.* v. *Advance United Expressways,* 494 F.2d 126, 138 (7th Cir. 1974); *Brennan* v. *Midwestern United Life Ins. Co.,* 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972)." (Emphasis supplied). (PA-40a).

The majority said that identification costs could not be charged to plaintiffs under Rule 33(c), which defendants contend is applicable if any discovery rule is applicable. That Rule provides that where information is to be derived from available business records and the cost of

derivation is substantially the same for both parties, the responding party can satisfy discovery requirements by making available the pertinent existing records for inspection or copying. In the majority's opinion, Rule 33(c) does not govern where computerized data is involved:

> "It may well be that where ordinary business records are concerned Rule 33 would generally require that the discovering party bear the expense of data compilation unless for special reason the compilation can be undertaken only by the respondent. However, Rule 33(c) cannot derogate from the general command of Rule 34 that the respondent to a demand for computerized information produce a 'reasonably usable' print-out of data contained in a computer's memory. Unlike Rule 34, Rule 33 was not especially tailored to the discovery problems posed by contemporary computer technology." (PA-42a).

The majority took no position on the proper cost allocation if Rule 33(c) were found applicable, however:

> "We intimate no view as to what the result in the instant case would be if Rule 33(c) were deemed applicable." (PA-42a, n.1).

Having found that the District Court had discretion under the discovery rules to allocate the costs of class member identification, the majority concluded that the District Court had not abused it by ordering the costs to be borne by the Fund. First, the majority reasoned that the Fund should have foreseen that its use of computers might well make it more difficult to furnish information in possible future litigation, and, therefore, the Fund should bear the expense of programming:

> "Computers, which in general make information more readily available, may occasionally make information more difficult to discover. Even where a party adapts his computer software strictly in accordance with legit-

imate business purposes, complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used. If the information demanded is such as the respondent might reasonably have expected to be required to make available for public examination or for use in the judicial process, it seems not unfair to require production of the information albeit necessitating special programming. . . . It is scarcely unreasonable, moreover, to demand of a respondent that he employ his computer resources to provide discoverable information of a relatively simple nature where, as here, the respondent makes extensive use of computers in the operation of its business." (PA-43a-45a).

Second, said the majority, the allocation was fair in light of the substantial size of the Fund's business:

> "Although compliance with the district court's order entails an expenditure by the fund in excess of $16,000 . . . [c]onsidering the extent of the fund's business . . . the burden of compliance with the Rule 34 discovery demand is not excessive." (PA-44a).

Third, the majority found that the opposition of defendants to plaintiffs' class reduction-broadcast mailing proposal justified the allocation. The majority identified defendants' reasons for opposition as: (1) the class reduction would limit the res judicata impact of the action; and (2) the mailing of class notices to non-class members would prejudice the Fund. (PA-45a-46a). Agreeing that the latter reason was "undoubtedly entitled to some weight" (PA-46a), it nevertheless said non-class members who would have received notice already knew of the litigation and the District Court could have "supervised the form of notice . . . so as to avoid undue prejudice to the fund." (PA-46a, n.4).

Judge Mulligan, joined by Judges Van Graafeiland and Meskill,[16] filed a cogent dissent which characterized the majority opinion as "conceptually unsound", "as a matter of logic . . . bewildering", "unprecedented", and "flouting" the decision of this Court in *Eisen IV*. (PA-49a, 52a, 56a). The dissenters would reverse the portion of the District Court's order imposing identification costs on the Fund for the reasons advanced by the Panel. They noted in part:

> "The majority forces the defendant to subsidize the suit against it, a result which is aberrant to our jurisprudence and to the extent that it depends upon the premise that the defendant has greater financial resources is further in conflict with *Eisen IV*. In sum, we believe Judge Palmieri's opinion for the panel properly disposed of the issue now before us en banc . . . ." (PA-48a).

> ". . . [W]e base our dissent on the ground that the costs involved here are unquestionably costs of notification which must be borne by the plaintiffs under Rule 23 and therefore are clearly within the rule of *Eisen IV*. The strained attempt to convert notification into Rule 34 discovery is conceptually unsound and unprecedented. We therefore adhere to the well-reasoned opinion of Judge Palmieri for the panel." (PA-56a).

Summary Of Argument

1. By imposing on defendant Fund the cost of identifying members of the class, the Second Circuit has nullified in material respects the recent decision of the Supreme Court in *Eisen IV* that plaintiffs must pay notice costs under Rule 23 if they wish to maintain their action as a class action. Identification of class members is an integral

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[16] Senior District Judge Palmieri, author of the 3-judge Panel decision, was ineligible to participate in the en banc proceedings. Also not participating were Circuit Judges Lumbard and Friendly.

component of the notice required to be given and whose costs plaintiffs are required to bear. The circumstances of this case, including defendants' proper opposition to plaintiffs' attempt to require a mailing to all present Fund shareholders, whether or not class members, do not warrant any change in the application of the rule of *Eisen IV*. A contrary result can only serve to increase the burdens on courts and parties of litigation which is largely undesirable and usually beneficial to few of those concerned other than the attorneys involved.

2. Under the guise of the federal discovery rules, the Second Circuit has improperly shifted to the Fund the costs of notice under Rule 23, even though the question of identification of class members did not arise under any discovery rule, and even though this Court in *Eisen IV* condemned resort to procedures outside Rule 23 to decide matters arising under that Rule. Plaintiffs do not seek and do not require information or knowledge; all they seek is to shift the burden of expense. For this reason alone, the identification of class members is outside the scope of permissible discovery. But even if the matter were discoverable, the cost would be chargeable to plaintiffs as provided in Rule 33(c), which is applicable where, as here, access is afforded plaintiffs to sources from which the required information must be extracted. Rule 34, relied on by the Second Circuit, is not applicable where, as here, a printout from existing material would not produce the requisite information. Despite intimations to the contrary in the Second Circuit's decision, the discovery rules do not and were not intended to shift costs not otherwise allocable to a party merely because in the regular course of business it (or its transfer agent) finds it necessary or desirable to keep business records on computers.

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

POINT I

The Second Circuit Majority, By Imposing On The Fund The Cost Of Identifying The Members Of The Class, Has Nullified In Material Respects The Recent Decision Of The Supreme Court In *Eisen IV* That Plaintiffs Must Bear The Costs Of Notice Under Rule 23(c)(2).

In *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*"Eisen IV"*), this Court ruled that in the usual class action, plaintiffs must bear the cost of the notice required to be sent to class members pursuant to Rule 23(c)(2); and if plaintiffs cannot or will not bear such cost, the class action cannot be maintained. The Second Circuit in this case has emasculated the rule of *Eisen IV*.

A. The Cost of Ascertaining The Names And Addresses Of Members Of The Class Is Part Of The Cost Of Notice Required By Rule 23(c)(2).

Where, as here, a class action is maintained under Rule 23(b)(3), subdivision (2) of Rule 23(c) requires that class members who are identifiable through reasonable effort be given individual notice of the pendency of the action, in terms as follows:

> "(2) In any class action maintained under subdivision (b)(3) [of Rule 23], the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not

request exclusion may, if he desires, enter an appearance through his counsel."

In *Eisen IV*, this Court held that under Rule 23(c)(2) individual notice to identifiable class members was mandatory:

"[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." 417 U.S. at 176.

Eisen IV also held that it is plaintiff who must bear the cost of this notice:

"[T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." 417 U.S. at 179.

Indeed, considerable support exists for the view that requiring defendants to bear notice costs would be so unfair as to border on a denial of due process. This view rests on considerations applicable here, that defendants would be unlikely to recover the costs of notice from plaintiffs if defendants should prevail, and that it would be unfair to force defendants to make such an expenditure before their liability has been established.

Thus in *Berland* v. *Mack*, 48 F.R.D. 121, 132 (S.D.N.Y. 1969), Judge Mansfield declared:

"To give a single member of a class who asserts a claim of doubtful merit the power to trigger such a substantial expenditure of corporate funds [i.e., to pay notice costs] . . . smacks of confiscation. Should the corporate defendant in such a suit prevail on the merits after laying out the initial expense of notice to the class, it would in most cases find it impossible to obtain reimbursement."

See also Note, "Class Actions Under Federal Rule 23(b)(3) —The Notice Requirement," 29 Maryland L. Rev. 139, 156-7 (1969) ("The unfairness in subjecting a defendant, *whose liability has not yet been established*, to the burden of giving notice . . . might . . . constitute a denial of due process." [Emphasis in text]); Comment, 5 Loyola Univ. (Chicago) L.J. 264, 280 (1974) ("A defendant who . . . is required to pay [the costs of giving notice] and prevails on the merits but cannot be repaid has, in effect, suffered a money judgment without judgment having been entered against him.").[17]

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[17] Similarly, in dissenting below, Judge Mulligan declared (558 F.2d at 655; PA-55a):

"The majority is not totally insensitive to the obvious inequity of requiring the defendant to finance the class action brought against it. It suggests that if the plaintiffs ultimately lose discretionary costs 'might' be assessed against them. But this is unrealistic. The plaintiffs have consistently maintained that they cannot afford to pay the $16,580 costs entailed. Their average stake in the litigation is in the range of $2 to $24. The prospect of the defendant obtaining reimbursement is dim indeed. The further suggestion that the costs may be recouped from counsel to the plaintiffs is admitted only as a possibility if the suit is found to be frivolous. If it is simply unsuccessful on the merits there is no hope at all of reimbursement. On the other hand, if the plaintiff class is successful there is no question that the prevailing parties will be entitled to costs, Fed.R.Civ.P. 54(a). Cost transference at this stage of the litigation therefore is hardly justified by the highly doubtful recoupment possibilities envisaged by the majority in derogation of the normal principles reiterated in *Eisen IV*."

In *Eisen III*, Judge Hays, author of the instant majority opinion, joined in rejecting imposition of notice costs on the *Eisen* defendants solely because the defendants would not be reimbursed for them if they prevailed. Said Judge Hays in *Eisen III* (479 F.2d at 1020):

"I concur in the result because I am unable to accept the ruling of the district court requiring the defendants to pay 90 percent of the cost of notice, since, if the defendants should finally prevail, they would not be reimbursed for this expenditure."

The notice required to be given under Rule 23(c)(2) necessarily involves a number of components, including at least the following: (1) ascertaining the names of class members, (2) learning their addresses, (3) preparing the form of notice, (4) printing the notice, (5) stuffing the notices in envelopes, (6) marking the envelopes with the names and addresses of class members, (7) putting postage on the envelopes, and (8) mailing them. If any of these components is eliminated, such as identification of class members, it is not possible to give the required notice under Rule 23(c)(2).

The majority of relevant cases expressly or impliedly treat the process of identifying class members as an integral part of the process of notifying class members. For instance, *In re Memorex Security Cases*, 61 F.R.D. 88, 103 (N.D. Cal. 1973) noted that the "method of notice" comprised "identification of . . . class members . . . and . . . mail . . . used to notify" them.[18]

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[18] *Accord: In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 359-60 (E.D. Pa. 1976); *Lamb* v. *United Security Life Co.*, 59 F.R.D. 25, 43 (S.D. Iowa 1972) (cost of notice includes cost of preparing list of class members); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F.Supp. 484, 494 (N.D. Ill. 1969) (preparation of mailing list of class members is a task associated with informing absent parties); *City of New York* v. *Darling-Delaware, Inc.*, 1976-1 CCH *Trade Cases* ¶ 60,812 at p. 68,514 (S.D.N.Y. 1976); *B&B Investment Club* v. *Kleinert's, Inc.*, 1973-4 CCH *Fed. Sec. L. Rep.* ¶ 94,451 at p. 95,372-73 (E.D. Pa. 1974); *In re Antibiotic Antitrust Actions*, 333 F.Supp. 278, 290 (S.D.N.Y. 1971); *West Virginia* v. *Chas. Pfizer & Co.*, 314 F.Supp. 710, 724-5 (S.D.N.Y. 1970); *Popkin* v. *Wheelabrator-Frye, Inc.*, 1975-6 CCH *Fed. Sec. L. Rep.* ¶ 95,411 (S.D.N.Y. 1976); *Herbst* v. *Able*, 47 F.R.D. 11, 17-19 (S.D.N.Y. 1969); *In re U.S. Financial Securities Litigation*, 69 F.R.D. 24, 46-7 (S.D. Cal. 1975) (plaintiffs required to exert reasonable efforts to identify class members); *Berland* v. *Mack*, 48 F.R.D. 121, 133 (S.D.N.Y. 1969) (Mansfield, J.) (portion of "cost of furnishing" notice includes expense of identifying class members); *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F.Supp. 673, 684 (N.D. Ind. 1966).

The language of Rule 23(c)(2) itself indicates that identification constitutes part of notice. The Rule requires the "best notice practicable under the circumstances"; and it defines as part of this notice "individual notice to all members who can be *identified* through reasonable effort." (Emphasis added.) As Judge Mulligan said in the dissent below:

> "This language [from Rule 23(c)(2)] would clearly indicate that the draftsmen of the rule made no distinction between the identification of the class and the notification of individual members. Notification posits identification which is an inseparable part of the process." 558 F.2d at 652; PA-50a.

Since identification of the names and addresses of class members is an essential component of the notice process, no logical or factual basis exists for treating the costs of identification as outside the rules relating to notice costs. The 3-judge Panel below noted:

> "Plaintiffs attempt to distinguish *Eisen III* and *Eisen IV* by asserting that the cost of identifying the members of a class is not a part of notifying those members. . . . However, we are of the opinion that the cost of obtaining the name and address to be affixed to the envelope does not differ in kind from the cost of printing the notice and of procuring, stuffing and posting the envelopes." 558 F.2d at 642; PA-21a-22a.

So too, the dissenters from the Second Circuit en banc decision, said:

> "The majority now creates in effect a bicephalous rule which is anomalous. The cost of printing, stuffing and postage of the notice *must* be borne by the plaintiffs but the cost of obtaining the names and addresses to

put on the envelopes *may* be thrust upon the defendants in the discretion of the trial bench. . . . We cannot appreciate how it can be reasonably held that the expenses incurred in producing the list of addresses is distinguishable from the expense of preparing and mailing the notice." (Emphasis in text). 558 F.2d at 652; PA-49a.

Directly in point is the recent Fifth Circuit case, *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), a class action maintained under Rule 23(b)(3).[19] The court there, in contrast to the Second Circuit, required plaintiffs to bear the costs of identifying class members, stating (at p. 1102):

"The time and expense of gathering their names and addresses [i.e. of the class members] is a necessary predicate to providing each with notice of the action's pendency without which the action may not proceed. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. at 179, ... [I]dentification of absentee class members' names and addresses is part and parcel of rule 23(c)(2)'s mandate that the class members receive 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'"

Since identification costs are part of the notice costs that plaintiffs must bear in order to obtain the benefits of a class

[19] Before the decisions in *Eisen III and Eisen IV*, a number of courts allocated all or a portion of identification costs to defendants under the erroneous view that this was in their discretion, but what is noteworthy is that they treated the costs of identification of class members as part of the costs of notice. *E.g.*, *Berland* v. *Mack*, 48 F.R.D. 121, 133 (S.D.N.Y. 1969); *Lamb* v. *United Security Life Co.*, 59 F.R.D. 25, 42 (S.D. Iowa 1972).

action, plaintiffs' ability or willingness to bear these costs is irrelevant. As this Court stated in *Eisen IV*:

"There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." 417 U.S. at 176.

Accord: Herbst v. *International Telephone & Telegraph Corp.*, 65 F.R.D. 13, 20 n. 17 (D. Conn. 1973), *aff'd*, 495 F.2d 1308 (2d Cir. 1974) ("The mere fact that a plaintiff cannot bear the cost of notice does not indicate that the defendant must pick up this bill. The desire to implement the class action device effectively must always be balanced by the fear that excessive concern for the financial interests of the plaintiff may result in the imposition of unwarranted expenses upon the defendant.")

Notwithstanding this Court's directions in *Eisen IV*, the Second Circuit majority, in imposing identification costs on the Fund, in fact considered the relative ability of the parties to pay,[20] stating:

"Although compliance with the district court's order entails an expenditure by the fund in excess of $16,000, we cannot say the burden thus imposed is unreasonable in light of . . . the extent and character of the fund's business operations." 558 F.2d at 650; PA-44a.

[20] The dissenters below observed that it is inherent in almost every class action that defendants are wealthier than plaintiffs:

"The deeper pocket is invariably in the trousers of the defendant. This consideration . . . was expressly rejected in *Eisen IV* where the Court stated, 'There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs'." 558 F.2d at 654; PA-53a.

B. Defendants' Opposition To Plaintiffs' Proposal Entailing A Mailing To Non-Class Members Did Not Justify Imposing On The Fund The Costs Of Identifying Class Members.

The Second Circuit majority in justifying the decision of the District Court referred to defendants' opposition to plaintiffs' two-pronged proposal to reduce the size of the class and to mail the class notice to all current Fund shareholders, whether or not class members. The District Court did not reject plaintiffs' proposal, however, because of any unreasonable or partisan demands by defendants, assuming *arguendo* such demands would justify imposing the identification costs of notice on the Fund. Rather, plaintiffs' proposal was rejected because it was arbitrary and unfair.[21] Said the District Court:

> "[P]laintiffs' proposal would involve *an arbitrary reduction in the class.* If the shareholders who purchased during the relevant period were misled into purchasing at inflated prices, then, as far as the present record shows, this problem affects those shareholders who have sold out just as much as those who happened to have retained their shares." 20 F.R. Serv.2d 1218, 1221; PA-5a-6a. (Emphasis supplied).

[21] Even if defendants had opposed plaintiffs' proposal because it required certification of an improper class, that should not justify imposing identification costs on defendants. Judge Mulligan, for the dissent, noted:

> "We cannot agree that by opposing an improper class a defendant thus becomes liable for any increased costs of notification. The class cannot become proper only if the defendant bears the costs of notifying the members. If this is to be the law the opportunities for abuse become obvious." 558 F.2d at 654; PA-54a.

Such a rule would in effect reward plaintiffs who propose improper classes that, for whatever reason, incite opposition from defendants.

The 3-judge Panel properly observed defendants' interests were unrelated to the District Court's rejection of plaintiffs' proposal, stating:

> "The district court . . . [held] that these persons could not be excluded because to do so 'would involve an arbitrary reduction in the class.' The class as originally defined was found to constitute the proper class for reasons unrelated to the interests of the defendants. It would thus be inconsistent to say that it is a proper class only if the defendants pay the costs. The two issues are distinct." 558 F.2d at 641; PA-20a.

Indeed, the public interest may in fact be well-served by the rejection of plaintiffs' proposal to reduce the class. Having a larger class may minimize the burdens on the judicial system by reducing possible "repetitive litigation of related subject matter." See Note, "Allocation of Initial Notice Costs Under Federal Rule 23(c)(2)," 1973 Illinois Law Forum 723 (1973). A larger class may also reduce "judicial paperwork by eliminating the use of the same documents in multiple suits"; and help "maintain judicial consistency by ensuring that different judgments do not occur in apparently similar cases." *Id.* at p. 724.

The Second Circuit's reference to the "presumed" benefits to the defendants of the res judicata effects disregards the fact that defendants themselves sought an even narrower class period than plaintiffs had proposed—namely, a cut-off date at April 25, 1969, instead of April 24, 1970. (PA-6a). Moreover, excluding from the class some 18,000 former Fund shareholders is not likely to result in harassment of the Fund, for if the Fund prevails in the class action, the likelihood of subsequent claims will be slight in view of the precedential impact of the prior decision. See Dam, "Class Action Notice: Who Needs It?," *The*

Supreme Court Review—1974, 97, 120 (1975) ("To the extent that class actions are the result of a lawyer's entrepreneurship, second actions need hardly be feared, for what entrepreneur would invest time and money in a venture already demonstrated to be profitless?"); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 760 (3rd Cir. 1974), *cert. denied* 419 U.S. 855.

Rather, defendants opposed plaintiffs' proposal essentially because it entailed a mailing to some 68,000 *non-class members* that would have unnecessarily risked harm to the Fund. Uncontradicted affidavits (A-121 *et seq.*; A-129 *et seq.*) established that in the declining market that then prevailed, the mutual fund industry suffered from a loss of investor confidence, and net redemptions were exceeding sales of mutual fund shares. See *supra* fn. 10 at p. 10. In those circumstances, it was reasonable to conclude that a formal notice sent out under the aegis of the court and charging Fund directors with derelictions of duty might well stimulate a wave of redemptions by non-class members. Such redemptions would consume the Fund's liquid assets, deprive it of investment opportunities, and require forced sales of parts of its portfolio. (A-129 *et seq.*). The 3-judge Panel found "[t]here is evidence in the record to substantiate the concern." 558 F.2d at 641; PA-21a.

The Second Circuit majority arbitrarily dismissed this risk to the Fund, noting that the Fund's management had already informed all Fund shareholders of the action, for example, in prospectuses. They ignored the obvious difference in impact between an official class notice and incidental references in documents largely devoted to other matters, e.g., prospectuses, proxy statements and annual reports, which many shareholders ordinarily read only cursorily, if at all.

The importance of the action announced by a class notice and the allegations summarized therein may be inflated, moreover, by the fact that the notice is an official document.[22] Thus, the court in *Dolgow* v. *Anderson*, 43 F.R.D. 472, 501 (E.D.N.Y. 1968), cautioned against any unnecessary publicity in connection with class actions, stating:

> "[T]he notice provisions themselves may prove harmful to defendants since the attendant publicity and *its official source may inflate the apparent importance of the action.* [citations omitted.] So much of the stock market depends upon faith and reputation that the court should be reluctant to lend its weight to any unnecessary publicity in connection with a pending lawsuit." (Emphasis supplied).

See also *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 761-2 (3d Cir. 1974) (recognizing "the additional settlement leverage which results from the disruption or injury which may occur to a defendant's business relationships regardless of the merits of the claim by the mere sending of the notice."). The 3-judge Panel below also differentiated between the "milder impact" of a few paragraphs in a prospectus and the effect of an official notice. 558 F.2d at 641, PA-21a. Similarly, *Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1099 (5th Cir. 1977), rejected a proposed notification of non-class members, where the class consisted of original retail purchasers of Datsun automobiles and plaintiffs sought to give notice to all present owners.

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[22] "The [Rule 23](c)(2) notice is the court's notice rather than any party's. The notice should be signed by the judge or by the clerk of the court. . . ." *Manual of Complex Litigation* § 1.45, West Publ. Co., (1977), p. 46.

C. The Relationship Among The Parties To This Action Justifies No Exception To The Rule In *Eisen IV* That Plaintiffs Must Bear The Cost Of Notifying The Class.

Eisen IV created no exceptions to the rule that plaintiffs must bear the cost of notifying the class under Rule 23(c)(2). It did refer, however, without elucidation, to the possibility of a different rule where a fiduciary duty pre-existed between plaintiffs and defendants, such as in a shareholder derivative suit. Said this Court at 417 U.S. 178:

> "The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit.[15]" (footnote in text)

In footnote 15, the Court stated:

> "15. See, e.g., *Dolgow* v. *Anderson*, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968). *We, of course, express no opinion of the proper allocation of the cost of notice in such cases.*" (Emphasis supplied).

Judge Hays' opinion for the en banc court below was silent and presumably abandoned his position in his dissent to the 3-judge Panel decision, that fiduciary relationships among plaintiffs and defendants justified imposing identification costs on the Fund.[23] Should such an exception exist, however, it would not be applicable here. First, plaintiffs' class action is not analogous in any material respect to a derivative action. A derivative action is brought exclu-

[23] The dissent to the Second Circuit majority decision noted: "Plaintiffs had argued before the panel that they were in a fiduciary position with the defendants and that therefore the possible loophole in *Eisen IV* applied. Judge Hays, dissenting in the panel opinion, espoused that position but it has been understandably abandoned in the en banc majority opinion." 558 F.2d at 652, n.2; PA-49a, n.2.

sively for the benefit of the corporation; a class action, like plaintiffs', is brought to benefit the class members and not the Fund. Thus the Fund and plaintiffs share no common interest that may arguably render the imposition of notice costs on the Fund fair. The 3-judge Panel stated:

> "The Supreme Court . . . described *Eisen IV* as a case where 'the relationship between the parties is truly adversary.' 417 U.S. at 178. . . . Possibly this was intended to contrast it with a derivative suit where the corporation, though a nominal defendant, has interests closely aligned with the plaintiff and indeed would be the beneficiary of any recovery." 558 F.2d at 640; PA-17a.

That plaintiffs do not assert class claims against the Fund indicates that the Fund is not truly a party defendant with respect to those claims. This alone renders *Eisen IV*'s statement concerning cases involving fiduciary duties inapposite. *Eisen IV* referred to situations where a fiduciary duty pre-existed between "the plaintiff and defendant." 417 U.S. at 178. The Fund, however, as the 3-judge Panel explained, is not a defendant in the class action:

> "No recovery is sought from the Fund in the class action. The plaintiffs have been careful to exclude the Fund itself from all allegations of wrongdoing and to seek recovery only from its directors, its managing company and the broker-dealer firm that controls the manager. Indeed, the Fund appears to have been named as a defendant only for purposes of the derivative claims which are not of concern here." 558 F.2d at 640; PA-17a-18a.

Further, the test advanced by *Dolgow* v. *Anderson*, 43 F.R.D. 472, *supra*, for shifting notice costs to a fiduciary

is no longer workable. *Dolgow* found a shifting of costs fair where various conditions were met, including a preliminary hearing on the merits followed by findings of a prima facie breach of fiduciary duty and that the defendant fiduciary was better able to bear the costs than plaintiff. 43 F.R.D. 472, 499.

In *Eisen IV*, however, this Court expressly found improper the holding of a preliminary hearing on the merits. Thus a prima facie breach of fiduciary duty, determined after such a hearing, may no longer be established. *Eisen IV*, 417 U.S. at 177-78. Also, *Eisen IV* prohibited considering the relative abilities of plaintiffs and defendants to pay for notice under Rule 23(c)(2); therefore, the fiduciary's greater ability to pay for notice is irrelevant. 417 U.S. at 176.

The impropriety of permitting allegations of breach of fiduciary duty to justify a shifting of notice costs is evident. By making such allegations, regardless how unfounded, plaintiffs could circumvent their obligation to pay for notice under Rule 23(c)(2). Moreover, the shifting of such costs may well be unfair to shareholders that have not joined the class. As *Berland* v. *Mack*, 48 F.R.D. 121, 131-2 (S.D.N.Y. 1969), observed:

> "We do not agree that the corporate defendant should be required initially to pay for the notice merely because charges of breach of fiduciary duty are at issue. . . . To give a single member of a class who asserts a claim of doubtful merit the power to trigger such a substantial expenditure of corporate funds, without any assurance of joinder on the part of other class members, smacks of confiscation. . . . We doubt that most stockholders expressly or impliedly consent to such a use of corporate funds for vindication of an issue as to fiduciary duty merely because it is raised by one of them."

D. The Second Circuit's Decision Will Further Encourage And Stimulate Vexatious And Burdensome Litigation.

The unfortunate effect of the Second Circuit's en banc decision, if it is permitted to stand, will be to increase the availability of and thus encourage class actions under Rule 23(b)(3) by relieving plaintiffs of class member identification costs. Class actions have heavily burdened an already overworked federal judiciary. By and large, these actions have served to reward class action attorneys rather than to provide any substantial benefits to class members. Their impact has been to bludgeon defendants into settling claims, often without much regard to the merits, in order to avoid loss of executive time, enormous litigation expenses and ruinous recoveries. Thus, *Eisen III*, 479 F.2d at 1018-9 stated:

> "Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how numerous or diverse the so-called class may be or how impossible it may ever be to compensate the individual members of the class, a champion steps forth. . . . [T]he huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim."

While the Advisory Committee's Note, 39 F.R.D. 69, 102 (1966), states that the purpose of Rule 23(b)(3) was to achieve "economies of time, effort, and expense," these goals have to a large extent not been achieved. Rule 23 has instead generated lawsuits that without the Rule would not have been brought. See Comment, 16 Boston College Industrial and Commercial Law Review 254, 263 (1975); Pollock, "Class Actions Reconsidered: Theory and

Practice Under Amended Rule 23," 28 Bus. Lawyer 741, 742 (April 1973); Simon, "Class Actions—Useful Tool or Engine of Destruction", 55 F.R.D. 375, 377 (1972). Moreover, when class suits are brought, they invariably tend "to be very time consuming." Comment, 16 Boston College Industrial and Commercial Law Review 254, 263 (1975).

The number of class actions pending in the federal district courts has been growing,[24] thereby adding to the burdens imposed by the general increase in the civil caseload of the federal courts.[25] Accommodation of class actions by the courts diverts scarce resources from other cases. Thus one commentator has observed:

> "Aside from his concerns about the burden of the case itself, a judge faced with an *Eisen* type of class action might be concerned with the impact of the case on his ability to deal adequately with the other cases on his docket. A federal district court, unlike the Supreme Court with its certiorari power, has little ability to control its workload. If it is already working at maximum efficiency, it can adjust to further cases only by reducing the quality of its work or by allowing its backlog to lengthen. In a time of already crowded dockets, the lengthened backlog may have the consequence of discouraging civil actions that would otherwise be brought and of rendering the criminal justice system less just and effective." Dam, "Class Action Notice: Who Needs It?", *The Supreme Court Review—1974* 97 at 105-6 (1975).

[24] In 1972, only 3,148 class actions were pending in the federal district courts. Administrative Office of the United States Courts, *1972 Annual Report of the Director for the Twelve Month Period Ending June 30, 1972*, p. 189. In 1974, when *Eisen IV* was decided, 4,680 were pending; in 1977, there were 6,281 pending. Administrative Office of the United States Courts, *1977 Annual Report of the Director for the Twelve Month Period Ending June 30, 1977 ("1977 Annual Report")*, p. 121. Despite the decision of this Court in *Eisen IV* imposing notice costs on plaintiffs, the number of pending class actions has risen since 1974. For increases in class action filings in the Southern District of New York, see the dissent to the Second Circuit majority opinion, 558 F.2d at 654-5, n.5; PA-55a, n.5.

[25] The number of pending civil cases per authorized district court judgeship has increased from 232 at the end of fiscal 1970 to 386 at the end of fiscal 1977. *1977 Annual Report* at p. 79.

Accordingly, serious doubts have been expressed whether limited judicial resources are best used to vindicate small wrongs sustained by a multitude of claimants. *Eisen III*, 479 F.2d at 1020, n. 28, quoting Judge Henry Friendly's *Federal Jurisdiction: A General View*, p. 120, declared:

> " 'Something seems to have gone radically wrong with a well-intentioned effort. Of course, an injured plaintiff should be compensated, but the federal judicial system is not adapted to affording compensation to classes of hundreds of people with $10 or even $50 claims.' "

See also *Hackett* v. *General Host Corp.*, 455 F.2d 618, 626 (3d Cir. 1972) ("Our scarce federal judicial resources cannot be allocated on the assumption that they must provide a forum for the vindication of every individual wrong however slight.").

Class actions may well be of little financial importance to class members whom they purportedly benefit. Plaintiffs' counsel, for instance, here acknowledges that the claims of members of plaintiffs' class average only about $15 each. After deduction of counsel fees and other expenses of litigation, possible recoveries by class members would be substantially less. See Simon, "Class Actions—Useful Tool or Engine of Destruction," 55 F.R.D. 375, 378:

"In a litigated class action, the nontaxable costs to the class members of preparing and proving a claim, including responding to discovery, will sometimes exceed the recovery."

Further, past experience shows that many class members will never even bother to collect their recovery. See Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?" 70 F.R.D. 199, 206 (1976):

"Typically, the hundreds of thousands or millions who are named in these cases have never had an interest in enforcing any claim, disregard or are baffled by notices that purport to make them members of the class—if any notice ever is received—and in most cases even fail to respond when settlements on their behalf have been made and monies are available for distribution."

See also Simon, "Class Actions—Useful Tool or Engine of Destruction", 55 F.R.D. 375, 379 ("Even after a settlement, where class members are notified that they can share in the recovery merely by filing a simple proof of claim, only 10% to 15% bother to do so".).[26]

Viewed realistically, the only certain beneficiaries of class actions, if they succeed, may well be plaintiffs' attorneys. As Judge Weinfeld observed in *Free World Foreign*

[26] Most class members are conscripts in the litigation:

"Thanks to the negative option procedure and to conscription technique, they [i.e., attorneys for class action plaintiffs] may be able to acquire an instant clientele of thousands—perhaps millions—merely because their new clients did not request exclusion, even though they never received the notice or understood it and even though their real desire is to have nothing to do with the matter." Pollock, "Class Actions Reconsidered: Theory and Practice Under Amended Rule 23," 28 Bus. Lawyer 741, 743 (April 1973).

Cars, Inc. v. *Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 30 (S.D.N.Y. 1972):

"[I]t is not idle to observe that class actions, which have proliferated tremendously since the advent of the current Rule—indeed beyond the expectations of its sponsors—threaten to engulf the courts; that substantial questions have been raised whether the Rule, intended to benefit the small consumer or investor who otherwise would have no means of redress, has really achieved its promise, or rather *whether it has resulted in miniscule recoveries by its intended beneficiaries while lawyers have reaped a golden harvest of fees.*" (Emphasis supplied.).

Similarly, Judge Henry Friendly observed the following concerning class actions:

"The benefit to any individual plaintiff often is minimal, considerably less than the cost of ascertaining his identity, establishing his damages, and preparing and mailing a check for the few dollars to which he is entitled. . . . While the benefits to the individual class member are usually miniscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled. Generally this is for a figure constituting a small fraction of the amount claimed but large enough to yield compensation to the plaintiffs' lawyers which seems inordinate even in the days of high legal fees." H. Friendly, *Federal Jurisdiction: A General View*, Columbia Univ. Press, New York, 1973, p. 119-120.

See also *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226, 237-8 (9th Cir. 1974) (concurring opinion) ("The real bonanza in a case like this, if it is won, will go to counsel. . . . I venture to suggest that none of the class action

features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys.")

While providing little benefit to class members, class actions have been extremely damaging to defendants. The mere possibility of becoming liable for enormous damages has led defendants to settle, often regardless of the merits of the case. Simon, *supra*, 55 F.R.D. at 389-390, noted:

> "The potential exposure in broad class actions frequently exceeds the net worth of the defendants, and corporate management naturally tends to seek insurance against whatever slight chance of success plaintiffs may have. Such insurance is usually available for a comparatively modest premium in the form of a settlement with the attorney who initiated the litigation and who purports to speak for vast numbers of people who have not retained him."

To the risk of liability must be added the "huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders." *Eisen III*, 479 F.2d at 1019. See also Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?" 70 F.R.D. 199, 202-203 (recognizing the abuse of discovery inherent in complex litigation, such as antitrust suits, in which defendants may be required to produce millions of documents); 4 J. Moore, *Federal Practice* ¶ 26.84 at p. 26-636 (2d ed. 1976).

Professor Milton Handler in "The Shift from Substantive to Procedural Innovation in Antitrust Suits—the Twenty-Third Annual Antitrust Review," 71 Col. L. Rev. 1, 9 (1971), has aptly termed the impact of class actions on defendants

> "a form of *legalized blackmail*. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace." (Emphasis supplied).

It is not unusual for those who defend the desirability of class actions to justify the imposition of these substantial litigation expenses and settlement costs on the ground that defendants are usually large businesses that can afford them. In fact, however, it is the whole society which must ultimately bear them. Sometimes society does so directly by paying higher prices for goods and services. See Kirkham, *supra*, 70 F.R.D. at 204 (". . . litigation is the new growth industry, adding millions of dollars to the cost of producing consumer goods and services."). Always society pays indirectly through the unusually heavy burdens, often out of proportion to the benefits realized, which class actions impose on the judicial system.

In *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 421 U.S. 240 (1975), this Court would not condone a change in policy that would shift the burden of litigation expenses incurred for legal fees even where the plaintiffs acted as private attorneys general and vindicated important rights for the entire public. Here where plaintiffs are not acting in a quasi-public character and there has been no final or even preliminary determination of the merits of their claims, there is no reason to change existing policy and shift Rule 23 expenses.

Neither considerations of social policy nor the facts and circumstances of the instant case warrant undercutting

this Court's decision in *Eisen IV* that plaintiffs are required to pay the costs of notice under Rule 23 if they wish to obtain the benefits of maintaining their action as a class action. Accordingly, the judgment of the Second Circuit en banc should be reversed.

POINT II

The Cost Of Identifying Class Members For Purposes Of Giving Notice Required Under Rule 23(c)(2) May Not Be Shifted To Defendants Under The Guise Of The Federal Discovery Rules.

The Second Circuit's attempt to avoid the proper application of *Eisen IV* to this case rests upon a misreading and misapplication of the federal discovery rules. The Second Circuit's rationale is summed up in its statement at (558 F.2d at 648; PA-40a) as follows:

> "In *Eisen,* the plaintiff's effort to impose the costs of notice upon the defendants failed '[i]n the absence of any support under Rule 23.' Here, Federal Rule of Civil Procedure 34 provides the basis for requiring the fund, at its own expense, to provide plaintiffs with discoverable information contained in its computerized records."

The attempt to analogize the costs of notice to the costs of discovery was previously before this Court in *Eisen IV* and was rejected by it, as was observed in the dissenting opinion below:

> "We note that in *Eisen IV* the petitioner's brief argued, 'Subjecting Respondents to the cost of notice does not differ in effect from requiring parties to make substantial expenditures to comply with discovery orders. . . .' Petitioner's brief at 40-41. The same argument was advanced on oral argument before the Supreme Court, 42 U.S.L.W. 3493. *The Court did not even dignify this argument by any discussion in its opinion."* (Emphasis supplied). 558 F.2d at 653, n.4; PA-52a, n.4.

A. Obtaining The Names And Addresses Of Class Members And The Costs Thereof Are Matters Which Arose In Proceedings Under Rule 23, Not In Connection With Discovery Proceedings, And Must Therefore Be Decided Under Rule 23 And Not Under The Discovery Rules.

The questions of class member identification and the costs thereof did not arise in this case in connection with any discovery proceeding. They arose on plaintiffs' motion for class determination under Rule 23, as is clear from the decision of the District Court, which states:

> *"Plaintiffs have moved for class action treatment* of a part of these consolidated cases, which consist of both class and derivative claims. *Certain problems have been raised,* mainly as to the definition of the class and *as to who is to bear certain expenses connected with the giving of notice."* (Emphasis supplied). 20 F.R. Serv. 2d 1218, 1219; PA-1a-2a.

Plaintiffs have never sought to invoke the discovery rules to ascertain the identities of class members, and the issue whether the names and addresses of class members are discoverable under federal discovery rules has never been in this case. For this very reason, the Third Circuit has recently held that non-party broker-dealers could not be required to pay the costs of class member identification, when plaintiffs there argued for the first time on appeal that these were costs of discovery allocable within the discretion of the District Court. See *In re Penn Central*

Securities Litigation, 560 F.2d 1138 (3d Cir. 1977), declaring (at 1145):

> "[T]here was in this case no compliance with the procedural requirements of Rule 34(b). The district court did not purport to act under Rule 34(b) in making its August 22, 1975 *ex parte* order.
>
> Since Rule 34 was not involved in this case in the district court we have no occasion to address the issue . . . of whether Rule 34 discovery is a method for avoiding some of the impact of the Supreme Court's holding in *Eisen IV* that the class representative must bear the initial cost of notice." [27]

Furthermore, the identification of class members is to be determined exclusively under Rule 23 rather than under the discovery rules. As was stated in the recent decision of the Fifth Circuit, *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977), which reached a conclusion contrary to the Second Circuit here:

> "[I]t becomes strikingly clear that rather than being controlled by the federal civil discovery rules, identification of absentee class members' names and addresses is part and parcel of rule 23(c)(2)'s mandate that the class members receive 'the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'"

[27] The Third Circuit in *Penn Central* distinguished the Second Circuit's en banc decision in the instant case on the erroneous assumption that the procedural requirements of the federal discovery rules had here been satisfied.

This follows from the Supreme Court's decision in *Eisen IV* that questions concerning the allocation of the costs of Rule 23 notice were to be determined under Rule 23 only.[28] Thus *Eisen IV* declared at 417 U.S. 178-9:

> *"In the absence of any support under Rule 23*, petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class . . . as part of the ordinary burden of financing his own suit." (Emphasis supplied).

Specifically rejected by this Court was an attempt to allocate notice costs derived from a procedure imported from proceedings applicable to preliminary injunctions: viz., an inquiry into the merits of the action. Using this procedure in *Eisen*, the District Court had decided plaintiffs were likely to recover and therefore imposed the bulk of the costs of notice on defendants. The Supreme Court held any such imported procedure impermissible because not authorized by Rule 23, saying (417 U.S. at 177):

> *"We find nothing in either the language or history of Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit . . . ." (Emphasis supplied).

[28] Resort to federal discovery rules is certainly unnecessary to enable the court to enter orders concerning notice. The power that it enjoys under Rule 23(d) is sufficient:

> "Rule 23(d) vests the district court, as manager of the class action, with the appropriate authority to enter whatever orders are necessary to the conduct of the action . . . and resort to the discovery rules for the authority to enter such orders is unnecessary." *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102 (5th Cir. 1977).

See also *Peoples* v. *Wainwright*, 325 F.Supp. 402, 403 (M.D. Fla. 1971).

Similarly, nothing in the language or history of Rule 23 authorizes resort to proceedings under the discovery rules to allocate notice costs. Procedures which are designed for other purposes may not be used under Rule 23 for the purpose of shifting the costs of notice.

B. The Identification Of Class Members Does Not Fall Within The Scope Of Information Discoverable Under The Federal Discovery Rules.

The scope of all federal civil discovery is limited by the provisions of Rule 26(b)(1), whether sought pursuant to Rule 33, Rule 34, or any other discovery provision. 4 J. Moore, *Federal Practice* ¶ 26.56 [1] at p. 26-115 (2d ed. 1976). Rule 26 was intended to and by its terms does limit discovery to the acquisition of information, and then only if the information is relevant to the subject matter of the action. In relevant part, Rule 26 provides:

> "(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter* involved in the pending action. . . . It is not ground for objection that *the information sought* will be inadmissible at trial if *the information sought* appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis supplied).

It is to be observed that while the introductory sentence of subdivision (b) of Rule 26 authorizes courts to further "limit" discovery, they are not authorized to expand the scope of discovery.

By implication, as well as by its terms, Rule 26 provides that discovery may not be used for purposes other than

obtaining information and knowledge relevant to the subject matter of the litigation. See *Hickman* v. *Taylor,* 329 U.S. 495, 507 (1947):

> "Mutual *knowledge* of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." (Emphasis supplied).

Where, as here, it is not information or knowledge which is sought, the discovery rules are completely inapplicable, and resort to them to evade payment of the expenses imposed by Rule 23 is an abuse of their purpose.

Here, plaintiffs do not seek any information that is relevant to the subject matter of the action or that is likely to lead to relevant evidence. What they seek is to have the Fund pay for the transfer agent's services leading to the preparation of properly-addressed envelopes so that plaintiffs may meet their own notice obligations under Rule 23. Whether plaintiffs ever see the names and addresses is completely irrelevant to their purpose. Thus without any request for a list of current shareholders, plaintiffs sought to have the Fund mail the notice to all current shareholders. Under the mantle of discovery—but not for the purposes of discovery—the Second Circuit majority would permit plaintiffs to transfer to the Fund responsibility for, and the cost of, performing one of several mechanical tasks that are a necessary part of providing the individual notice required by Rule 23 if plaintiffs are to obtain the benefits of a class action. As Judge Mulligan stated for the dissenters (558 F.2d at 651-2; PA-48a):

> "[P]laintiffs . . . admittedly are only seeking the list of names and addresses of the potential plaintiff class

> in order to notify them of the pending action. . . . Since the only purpose of obtaining the required information is to notify the class as mandated by Rule 23, *Eisen IV* compels the conclusion that the cost of such notification be borne initially, at least, by the plaintiffs."

The Second Circuit majority tried to establish that the names and addresses of class members were in some way relevant to the subject matter of the action by devising a counterfeit issue. Observing that individual notice must be sent to class members, the Court reached the remarkable non sequitur: *"Eisen* raises a *potential* issue in all such litigation whether the required notice has properly been sent", and therefore the names and addresses of class members would be "essential to the resolution of that issue." (Emphasis supplied). 558 F.2d at 648; PA-40a.

Such abstract theorizing about an issue which is not now and has never been in this case is at best metaphysical and specious. Since this "potential" issue is sheer speculation, it is difficult indeed to conceive how it could have "ineluctably propelled" the Court below to its conclusion. As the dissent observed: "This is an exercise in sophistry and not syllogistic reasoning". 558 F.2d at 653; PA-51a. Certainly this potention "issue" would not be raised by the Fund, whose agent was furnishing the names and addresses of class members, nor by plaintiffs whose concern is to avoid expense.[29] This conjectural "issue" is too remote

[29] The dissent below recognized the remoteness of the issue of proper notice, stating:

> "The plaintiffs have never sought discovery relief under Rule 34. In the memoranda submitted by the plaintiffs to Judge Griesa prior to his opinion below there is no mention of Rule 34. . . .
>
> No party here, certainly not the plaintiffs, is seeking 'discovery' as a method of determining whether notice has 'properly' been sent. Plaintiffs are not anticipating potential issues and seeking discovery to maintain a position. They were avowedly and quite simply seeking the list to notify the class under Rule 23. Should any issue arise as to 'proper notification', e.g., was the list complete, was the notice appropriate, was the postage adequate, presumably it would be raised by a putative member of the class but not *in limine* by the plaintiffs who are required to notify and pay the costs of notification under *Eisen IV*." 558 F.2d at 653; PA-51a-52a.

to warrant application of discovery rules in order to justify shifting costs to defendants for a task which is required to satisfy the mechanics of Rule 23(c)(2). Matters so remote are not within the scope of discovery. See *In re Fontaine,* 402 F. Supp. 1219, 1221 (E.D.N.Y. 1975):

> "While the standard of relevancy is a liberal one, it is not so liberal as to allow a party 'to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.'"

See also *Hickman* v. *Taylor,* 329 U.S. 495, 508 (1947) (discovery not permitted where inquiry "touches upon the irrelevant").

The cases the Second Circuit majority relied on to support its views about the discoverability of the names and addresses of all class members entirely fail to do so. For example, *Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d 126 (7th Cir. 1974), involved no action under the discovery rules. The court there ordered defendant motor carriers to prepare lists of class members to facilitate notification in order to penalize the carriers. The carriers had obstructed identification of the class members *after* they had been held liable for refunds to class members by the Interstate Commerce Commission and the district court. This punitive rationale is inapplicable here since there has been no obstruction whatsoever of iden-

tification; nor has there been any determination on the merits establishing defendants' liability.[30]

Similarly, the Second Circuit's reliance on *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. den.* 405 U.S. 921 (1972), is misplaced. The issue there was whether properly notified absentee class members were subject to sanctions for failing to comply with defendants' demands for discovery—not discovery of class members' identities.

Accordingly, even if the question of identification of class members had arisen properly under the discovery rules, the identification of class members would be outside the scope of permissible discovery, and therefore the discovery rules cannot justify imposing the costs of identification on the Fund.

The burdens imposed on courts and litigants in class actions have been alluded to in Point I, at pp. 37-43, *supra*. Those burdens arise in part because of ever more liberal interpretation of the discovery rules taken in conjunction with notice pleading. Where relevancy to an ill-defined subject matter is the test, discovery may proceed for years at great expense to the litigants, clogging court calendars and ill-serving the repute of the judicial system. Serious concern over the abuses of the federal discovery rules was expressed at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference"), which was held in 1976 and was jointly sponsored by the Judicial Conference of the

[30] See Note, "Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement," 29 Maryland L.Rev. 139, 156-7 (1969) ("[C]onsiderations of unfairness that arise where a requirement of notice is placed upon a perhaps blameless defendant *before liability is established* are absent where a consideration of the merits of the case reveals that the defendant has acted unlawfully to the injury of many."). (Emphasis in text.).

United States, the Conference of Chief Justices, and the American Bar Association. 70 F.R.D. 79 *et seq.* See especially Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?", 70 F.R.D. 199, at 202-07 (1976); Simon H. Rifkind, "Are We Asking Too Much of Our Courts?", 70 F.R.D. 96, at 107 (1976). The Pound Conference led to creation by the American Bar Association of a special Ad Hoc Committee on Abuse of Discovery, which confirmed that discovery devices have been overused and misused. See "Opening Statement" by Paul R. Connolly, Chairman of ABA Section of Litigation in 3 *Litigation* (The Journal of the Section of Litigation, American Bar Association) at p. 1-2 (Summer 1977), which among other things criticizes the "prevailing cant" of "full discovery".

In the circumstances here present, there is nothing that warrants any further extension of the discovery rules beyond the scope now permissible under Rule 26(b).

C. If The Discovery Rules Are Applicable, The Identities Of Class Members Would Only Be Discoverable Under Rule 33(c) At Plaintiffs' Expense, Not Under Rule 34.

Even assuming *arguendo* that the names and addresses of class members are discoverable for the purpose of notice under Rule 23, the cost of obtaining them nevertheless must be paid by plaintiffs pursuant to Rule 33(c). The Second Circuit majority erred in finding them discoverable under Rule 34.

Rule 34 is limited to the production for inspection and copying of designated documents and tangible things. It provides in relevant part:

> "(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making

the request . . . to inspect and copy, *any designated documents* (*including* writings, drawings, graphs, charts, photographs, phono-records, and other *data compilations from which information can be obtained,* translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters *within the scope of Rule 26(b)* and which are in the possession, custody or control of the party upon whom the request is served . . . ." (Emphasis supplied).

In finding the names and addresses discoverable under Rule 34, the Second Circuit majority emphasized the 1970 Amendment to the Rule, which defined documents to include: "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form", and the Advisory Committee Note on the Amendment, 48 F.R.D. 459 at 527.[31] Neither the Amendment nor the Advisory Committee Note, however, goes beyond requiring production of materials already in existence. No evidence indicates that the Amendment was intended to permit imposing on the responding party the burdens of time and expense in devising computer programs to search out and combine data from several sources so as to produce new information of interest to the discovering party.

[31] The Advisory Committee Note provides in relevant part:

"The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data."

Accordingly, a list of the names and addresses of class members comparable to that involved in the instant case is not discoverable under Rule 34. No such list exists on any magnetic tape in defendants' possession. While a printout can be made of all present shareholders, no printout can be made of the names and addresses of class members until, among other things, new programs are devised so that the computer can search the requisite tapes. It is well-established that Rule 34 is inapplicable to require the production of material that does not yet exist and must first be created. See *e.g.*, 4A J. Moore, *Federal Practice* ¶ 34.05[1] at p. 34-32 (2d ed. 1975); 8 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2210, p. 625, West Publ. Co. (1970); 7 *Cyc. Fed. Proc.* § 25.535, page 463, Callaghan & Company (1971). *Soetaert* v. *Kansas City Coca Cola Botting Co.,* 16 F.R.D. 1, 2-3 (W.D. Mo. 1954) thus declared:

"Rule 34 cannot be used to require the adverse party to prepare or cause to be prepared, a writing to be produced for inspection, but can be used only to require the production of things in existence . . . . I cannot order produced something not shown to exist."

The redefinition of the word "documents" in the 1970 Amendment merely clarified the scope of Rule 34; it did not change it. *United States* v. *Davey,* 543 F.2d 996, 999 (2d Cir. 1976).

The 3-judge Panel properly recognized the inapplicability of Rule 34 to require that defendants start to compile a list of class members that does not exist, stating:

"This rule [Rule 34] addresses itself to the *production* of data compilations for inspection or copying, not to the sorting or analysis of the data . . . . The task of culling relevant names and addresses from a long list, as confronts the parties here, is a distinctly different

one from the production for inspection and copying with which Rule 34 is concerned. If 'sophisticated electronic manipulation and analysis' become necessary, 'the courts will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets.' 8 C. Wright and A. Miller, Federal Practice & Procedure § 2218 at 659 (1970)." (Emphasis in text). 558 F.2d at 642; n. 7; PA-23a, n. 7.

A contrary view would radically alter the impact of Rule 34, with the most serious consequences for all litigants who may consequently be required to shoulder burdens that properly belong on the party seeking information. No vast imaginative powers are required to foresee that just as litigants may now be required to produce millions of documents in antitrust actions,[32] they would soon be subject to harassing requirements to prepare elaborate, expensive programs to search for computerized data. Still appropriate is the warning given in *Eisen III*, 479 F.2d 1005, 1013, with reference to Rule 23, admonishing against

> "disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure. . . . *It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions,* including oppressions by those whose intentions may be above reproach."[33] (Emphasis supplied).

[32] See Kirkham, "Complex Civil Litigation—Have Good Intentions Gone Awry?", 70 F.R.D. 199, 203 (1976).

[33] Footnote 13 at this point in *Eisen III* points out:

"13. . . . The importance of due process of law and procedural fairness has been emphasized by some of our leading jurists. Justice Brandeis observed that 'in the development of our liberty insistence upon procedural regularity has been a large factor.' (Burdeau v. McDowell, 256 U.S. 465, 477 . . . (1921) (dissenting opinion)). Justice Frankfurter also remarked that '(f)airness of procedure is "due process in the primary sense • • •." It is ingrained in our national traditions.' (Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 161 . . . (concurring opinion))."

Certainly the draftsmen of Rule 23 had no intention of diluting procedural safeguards for class action defendants. Thus Professor Benjamin Kaplan, who was Reporter to the Advisory Committee on Civil Rules when Rule 23 was amended, stated:

> "The object [of Rule 23] is to get at the cases where a class action promises important advantages of economy of effort and uniformity of result *without undue dilution of procedural safeguards* for members of the class *or for the opposing party.*" (Emphasis supplied). Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)," 81 Harv.L.Rev. 356, 390 (1967).

Even if the names and addresses of class members are discoverable, which defendants deny, they would properly be discoverable only under Rule 33(c); and under that Rule, plaintiffs would be required to bear the expense of obtaining them.

Rule 33(c), which deals with interrogatories, provides in relevant part:

> *"Option to Produce Business Records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or *from a compilation, abstract or summary based thereon,* and the burden of deriving or ascertaining the answer is substantially the same for the party serving the

> interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries." (Emphasis supplied).

This provision protects parties from burdensome discovery requests, where the burden of ascertaining the answer is substantially equal for the party seeking discovery as for the party from whom discovery is sought; it requires the party seeking the information to bear the discovery expense.

Clearly, here the amount of payment for the transfer agent's services in obtaining the list of class members will be identical for all parties. All necessary computer tapes, machinery and records are fully available to plaintiffs. *Sanders* v. *Levy*, 558 F.2d at 653; PA-52a. In these circumstances, plaintiffs must bear the expense of discovering the names and addresses of class members, under the long-established practice in federal civil discovery.[34] See *e.g.*, *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1102-3 (5th Cir. 1977) (where records containing identities of class members "may be examined as readily by the class representatives as defendants. . . . plaintiffs [i.e., the class representatives] are required at their own expense to compile a list of the absentee class members' names and addresses. . . ."); *Leonia Amusement Corp.* v. *Loew's Inc.*, 18 F.R.D. 503, 507 (S.D.N.Y. 1955); *Tytel*

[34] The same result would obtain if share records were kept manually, and no lists existed of the names and addresses of shareholders who bought Fund shares during the relevant period. If defendants then afforded plaintiffs access to existing transfer sheets, it could hardly be contended that the cost of compiling the names and addresses of class members should be borne by defendants.

v. *Richardson-Merrell, Inc.*, 37 F.R.D. 351, 353 (S.D.N.Y. 1965); *Konczakowski* v. *Paramount Pictures Inc.*, 20 F.R.D. 588, 593 (S.D.N.Y. 1957):

> "With regard to those interrogatories which request information and data obtainable from available documents, the general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents pursuant to Rule 34 of the Federal Rules of Civil Procedure, or by doing a little footwork, as the case may be."

If there is any explanation for the Second Circuit's erroneous choice of the applicable discovery rule, it is that under Rule 33(c), the court is without discretion to allocate discovery expenses, while under Rule 34 it has such discretion. The grounds which the Second Circuit majority purported to rely on for exercising such discretion in favor of plaintiffs were the Fund's ability to pay and the position taken by defendants with respect to plaintiffs' twin proposal for class reduction and broadcast mailing. The invalidity of these grounds has been demonstrated in Sections A and B of Point I, at pp. 28-33, *supra*.

Finally, the Second Circuit sought to justify imposing identification expenses on the Fund because the Fund has computerized its shareholder records, thereby allegedly making identification "more difficult" than it otherwise would have been (558 F.2d at 649; PA-43a):

> "Computers which in general make information more readily available, may occasionally make information more difficult to discover. Even where a party adapts his computer software strictly in accordance with legitimate business purposes, complex electronic processes

may be required to extract information which might have been obtainable through a minimum of effort had different systems been used."

It must be observed that there are no facts in the record supporting these speculations of the Second Circuit. On the contrary, it appears more likely that retrieval of the names and addresses of the 121,000 class members would have been more difficult, laborious and expensive had the records not been computerized. It would then have required manual extraction of the names and addresses from daily transaction sheets covering more than 500 trading days during the relevant period, involving approximately 150,000 separate purchases by the 121,000 class members. (A-209). Even more important, however, as the Second Circuit majority recognized, the Fund could not operate without computers:

"It scarcely need be said that the computer plays an integral role in the operations of the fund; indeed, in the absence of computer technology, operations so vast and complex as those of the fund might well be impossible to conduct." 558 F.2d at 647; PA-37a.

Equally unsupportable is the Second Circuit's suggestion that the Fund should have anticipated the need to be able to identify class members:

"If the information demanded is such as the respondent might reasonably have expected to be required to make available for public examination or for the use in the judicial process, it seems not unfair to require production of the information albeit necessitating special programming." 558 F.2d at 649; PA-43a.

No evidence suggests that the Fund or any other defendant had any reason to anticipate a class action brought by the class on whose behalf plaintiffs have sued. Cf. *Appleton Electric Co.* v. *Advance-United Expressways,* 494 F.2d

126 (7th Cir. 1974). As Judge Mulligan aptly stated for the dissenters, it would be unreasonable to force defendants to guess what diverse classes might choose to sue them and program their computers according to their anticipatory hunches:

"But what law demands that the defendant maintain lists of past and present customers who might in the future band together to sue the corporation in some class whose perimeters will be fixed by the accidents and exigencies of possible litigation? . . . To require corporate defendants to so arrange their computer programming as to anticipate the endless variety of prospective classes which might some day bring class actions is, of course, unrealistic and not required by any law we know of until this decision which hopefully will be short lived." 558 F.2d at 654; PA-54a.

There is not the slightest hint in this case that defendants have deliberately tried to hamper the identification of class members through computer use. Computers are today a standard device used in businesses of various sizes. The recent study, Nyborg, McCarter & Erickson, *Information Processing in the United States: A Quantitative Summary,* published by American Federation of Information Processing Societies, Inc., Montvale, New Jersey (1977), p. 21, describes the extent of computer use in the United States as follows:

"[C]omputer usage in the United States is dramatically increasing. The number of all *computers* installed in the United States has climbed from 88,000 in 1971 to 229,000 in 1976 . . .; similarly, spending by users on computers and computer services (equipment, services, and user salaries, exclusive of user overhead) has grown from $16.8 billion in 1972 to $30.9 billion in 1976. Further, the distribution of both usage and applications is extremely broad; as pointed out in a recent

issue of *Science* magazine [H.D. Mills, "Software Engineering," *Science*, Vol. 195, p. 1201 (1977)] '[a]lthough nothing of the kind existed 25 years ago, every sizable business, Government agency, and institution in the United States now depends in a critical way on data processing systems.'

Many factors have contributed to the growth of computer usage. For instance, IDC [International Data Corp.] in the June, 1976, *Fortune* magazine reported that the average costs of a computer has dropped from $326,000 in 1965 to $172,000 in 1976, a trend that is expected to continue through 1980. This price decrease reflects in part, IDC said, the advent of small business computers . . . which have made data processing increasingly accessible to even the smallest businesses." (Emphasis in text).

To the extent that the Second Circuit majority has imposed identification costs on the Fund because it uses computers, the Court has unfairly penalized the Fund for adopting a common business practice that it requires for survival in a complex and competitive world. To the extent that the Second Circuit would extend Rule 34 beyond its present scope to shift to defendants the cost of searching and creating computer tapes in order to identify class members, it exposes all litigants with computers, even nominal defendants, to the hazards of enormous litigation expenses in order to satisfy the insatiable demands for discovery by opponents, who may be only nominal adversaries. To the extent that the Second Circuit would apply any of the discovery rules in order to enable plaintiffs to avoid their obligations under Rule 23, it has without legal warrant violated the limits on the scope of discovery and nullified in material respects the Supreme Court's decision in *Eisen IV*.

Conclusion

The judgment of the Second Circuit should be reversed, with directions to vacate the order of the District Court insofar as it relates to the payment of the cost of identification of class members, and to require plaintiffs to bear those costs if they choose to continue the class action.

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APPENDIX

Appendix of Rules Involved

Federal Rules of Civil Procedure

Rule 23(a)-(d), 28 U.S.C., *Class Actions.*

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who

does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings

be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

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Rule 26, 28 U.S.C., *General Provisions Governing Discovery.*

• • •

(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

• • •

Rule 33, 28 U.S.C., *Interrogatories to Parties.*

• • •

(c) *Option to Produce Business Records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination,

audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

• • •

Rule 34, 28 U.S.C., *Production of Documents And Things And Entry Upon Land For Inspection And Other Purposes.*

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compliations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.